No. 86-1627

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF ANGOON, *et al.*,

Petitioners,

v.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, *et al.*,
SHEE ATIKA, INC., AND SEALASKA CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE A BRIEF OF AN AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI AND BRIEF AMICUS CURIAE OF NUNAM KITLUTSISTI IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE A BRIEF OF AN AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

Pursuant to Supreme Court Rule 36.1, Nunam Kitlutsisti moves for leave to file a brief of an *amicus curiae*. The brief supports the petition for certiorari on one issue which Nunam Kitlutsisti litigated before this Court in *Amoco Production Co. v. Village of Gambell*, ___ U.S. ___ , 107 S. Ct. 1396 (1987). Counsel for respondent Sealaska Corporation, the Solicitor General, and counsel for petitioner City of Angoon consent to the filing of the brief. Counsel for respondent Shee Atika Corporation has not consented.

Respectfully submitted this 12th day of June, 1987.

/s/ ROBERT K. HICKERSON

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ISSUE PRESENTED

I. IS THE NAVIGATIONAL SERVITUDE IN COASTAL WATERS AN INTEREST IN WATER TO WHICH THE UNITED STATES HOLDS TITLE?

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BRIEF AMICUS CURIAE OF NUNAM KITLUTSISTI IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST

Amicus curiae Nunam Kitlutsisti is an intertribal organization representing fifty-six tribal villages in the Yukon-Kuskokwim Delta, an area comprising most of western Alaska. With a name literally translated from Yupik Eskimo as the "defender of life and land," Nunam Kitlutsisti has the mission of protecting the hunting and fishing rights of its members. This case presents an issue potentially affecting the scope of the statutory protections for Native fishing and hunting rights of Eskimos living in the Yukon-Kuskokwim Delta. That issue—the scope of activities to which statutory protections for hunting and fishing apply—was recently addressed by this Court in *Amoco Pro-*

duction Co. v. Village of Gambell, ___ U.S. ___, 107 S. Ct. 1396 (1987). As a party to that litigation, as well as an entity whose members are affected by interpretations of the statutory protections involved here, Nunam Kitlutsisti has a strong interest in ensuring that this Court's decision in *Gambell* is respected.

SUMMARY OF ARGUMENT

The court of appeals issued its opinion in this case on October 31, 1986. That decision found, *inter alia*, that Section 810 of the Conservation Act did not apply to the issuance of a permit allowing a private party to block the navigational servitude of the United States. The rationale for this conclusion was that the United States did not hold a written, recorded title to the servitude. Several months later, on March 24, 1987, this Court issued *Amoco Production Co. v. Village of Gambell*, ___ U.S. ___, 107 S. Ct. 1396 (1987). There, when addressing whether the United States held title to the mineral resources of the Outer Continental Shelf, this Court specifically rejected the argument that "title" should be construed as requiring a recorded deed. Finding that title should be given its ordinary meaning, this Court suggested that the United States holds title to all interests over which it asserts the right of control and disposition. Since this reasoning flatly rejects the rationale relied upon by the court of appeals, this Court should remand this matter in order to provide the court of appeals the opportunity to review its decision in light of *Gambell*.

ARGUMENT

I. THIS COURT'S *GAMBELL* DECISION INDICATES THAT A PERMIT ALLOWING A PRIVATE PARTY TO USE THE NAVIGATIONAL SERVITUDE TRIGGERS THE PROTECTIONS OF SECTION 810 OF THE CONSERVATION ACT.

In 1980, Congress enacted the Alaska National Interest Lands Conservation Act (Conservation Act) in an effort to preserve Alaska's natural and cultural resources. 16 U.S.C. §§ 3101 *et seq.* As a part of this undertaking, Congress passed Section 810 of the Conservation Act for the purpose of protecting subsistence uses of the "public lands" by Native Alaskans. As enacted, Section 810 requires federal agencies to evaluate the effect upon subsistence uses of these lands before permitting the use or other disposition of public lands. 16 U.S.C. § 3120. For the purpose of determining the scope of activities to which Section 810 applies, public lands are defined as "lands, waters, and interests therein . . . title to which is in the United States after the date of enactment of [ANILCA]." 16 U.S.C. § 3102.

In the decision below, the court of appeals refused to find Section 810 applicable to federal interests in Alaskan coastal waters. The claim advanced by the village of Angoon is straightforward. To economically log land on Admiralty Island, Shee Atika Corporation was required to secure from the Army Corps of Engineers a permit allowing it to build a breakwater on the navigational servitude held by the United States. Since Section 810 of the Conservation Act requires compliance in every instance when any federal agency issues a permit, the issuance of the breakwater permit—which the Corps now apparently concedes was

a major federal action significantly affecting the quality of the environment[1]—triggered the protections of Section 810.

The court of appeals rejected this claim on the ground that the permit did not allow Shee Atika to use an interest to which the United States held title. Holding that "[s]ince the United States does not hold title to the navigational servitude, the servitude is not 'public land' within the meaning of ANILCA," the court found that the issuance of the breakwater permit did not trigger the protections offered by that statute. *City of Angoon v. Hodel*, 803 F.2d 1016, 1027-28, n.6 (9th Cir. 1986). The decision thus permits the Corps to issue permits for the use of a servitude, owned by the United States, without complying with the requirements of Section 810.

The decision by the court of appeals conflicts with this Court's subsequent opinion in *Amoco Production Co. v. Village of Gambell*, ___ U.S. ___, 107 S. Ct. 1396 (1987). That case presented an issue not substantially different than the one involved here. There, the Department of the Interior argued that Section 810 did not apply to Outer Continental Shelf leasing because the United States does not hold title to the OCS or to its mineral resources. Although this Court found that Section 810 does not apply to the Outer Continental Shelf, it rejected the notion that "title" to an interest refers to a technical record or deed title. Adopting the plain and ordinary meaning of the word "title"—which is simply the right to control or dispose of an interest[2]—this Court specifically rejected

[1] This concession is implicit in the Corps' decision to prepare an environmental impact statement before issuing the permit.

[2] *E.g.*, BLACK'S LAW DICTIONARY.

the claim that the United States did not hold title to the mineral resources of the OCS. After noting that the plain language of the Conservation Act indicates that Section 810 applies to federal lands within the boundaries of Alaska, including coastal waters "to a line three miles from its coastline," 107 S. Ct. at 1405, this Court stated:

> The United States may not hold "title" to the submerged lands of the OCS, but we hesitate to conclude that the United States does not have "title" to any "interests therein." Certainly, it is not clear that Congress intended to exclude the OCS by defining public lands as "lands, waters, and interests therein" "the title to which is in the United States."

107 S. Ct. at 1406, n.15.

The conclusion that the term "title" is not limited to a technical record or deed title follows from the purpose of the definition of public lands. As this Court was aware, to ensure that State and Native land selections would not be invalidated by subsequent inclusion in federal conservation units, Section 102's definition of public lands distinguishes between those interests *specifically relinquished* to the State and to Native groups under the exercise of valid selection rights and those interests *still retained* by the United States after the enactment of the Conservation Act. H.R. Rep. No. 1045, Part I, 95th Cong., 2d. Sess. 80 (1978); 125 Cong. Rec. H49 (January 15, 1979) (statement of Cong. Udall). The phrase "title to which is in the United States" in Section 102 thus simply delineates retained from relinquished interests, in effect

recognizing the tautological proposition that the United States cannot hold title to interests it has previously conveyed away.

By failing to recognize that the term "title" simply connotes a right of control and disposition—rights which the United States unquestionably exercises over the navigational servitude—the decision below contravenes the language of the Conservation Act as well as this Court's *Gambell* decision interpreting that language. The navigational servitude is a paramount federal right to and power over navigable waters which is derived from the Property and Commerce Clauses, U.S. Const. art. I, § 8, cl. 3; U.S. Const. art IV, § 3, cl. 2. The source and nature of this federal interest was first articulated by the so-called Tidelands cases: *United States v. California*, 332 U.S. 19 (1947); *United States v. Louisiana*, 339 U.S. 699 (1950); and *United States v. Texas*, 339 U.S. 707 (1950). There, in rejecting claims by coastal states that they held title to submerged lands within their territorial waters, this Court held that "paramount rights in and power over" the coastal zone vest in the federal government and that "acquisition" of the coastal zone is an incident of national sovereignty. *California*, 332 U.S. at 34, 38; *Louisiana*, 339 U.S. at 704; *Texas*, 339 U.S. at 719. Those cases indicate that the United States holds title to the coastal zone because *dominium* (property interests) in the coastal zone is so subordinate to *imperium* (rights of sovereignty) as to "coalesce and unite" in the United States. *E.g.*, *Texas*, 339 U.S. at 719. This conclusion was reached in the face of a forceful dissent by Justice Frankfurter who, accepting the majority's position that the states have no title in the coastal zone, argued that a decision

recognizing federal ownership of coastal waters should be made by Congress rather than by the courts. *California*, 332 U.S. at 45-46 (Frankfurter, J., dissenting).[3]

The Submerged Lands Act confirms the principle, made explicit by the Tidelands cases, that the navigational servitude is an interest in water to which the United States holds title. After the Tidelands cases had cast a cloud upon the presumed state title to lands beneath navigable waters,[4] Congress removed that cloud by enacting the Submerged Lands Act of 1953. 43 U.S.C. § 1301. To achieve this end, the Act conveys to the several states "title to and ownership of the lands beneath navigable waters." 43 U.S.C. § 1311(a). Additionally, and of greatest importance here, the Act expressly retains the United States' interests in the navigational servitude, together with all powers of regulation and control for the constitutional purposes of commerce, navigation, defense and international affairs. 43 U.S.C. at § 1314(a). *See also United States v. California*, 436 U.S. 32, 41 n.18 (1978). This reservation of the navigational servitude expressly declares the servitude to be paramount to, but not inclusive of, the states' rights of ownership and control

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[3] The navigational servitude extends to all navigable waters within the United States. Therefore, it follows from the rationale of the Tidelands cases that title to appurtenant inland waters vests in the United States as well. *See Submerged Lands: Hearings on S.J. Res. 13, S. 204, S. 107, and S.J. Res. 18 Before Senate Comm. on Interior and Insular Affairs*, 83d Cong., 1st Sess. 235 (1953) (Statement of Sen. Daniel).

[4] *See, e.g., Submerged Lands: Hearings Before the Senate Comm. on Interior and Insular Affairs*, 83d Cong., 1st Sess. 256 (1953) (statement of Harry Brockel).

of those lands and resources conveyed by other sections of the Act. *Id.* As this Court has held, this reservation represents a valid exercise of Congress' constitutional right to dispose of property belonging to the United States "without limitation." *Alabama v. Texas*, 347 U.S. 272, 273 (1954).[5]

The proposition that the United States holds title to the navigational servitude—a tenet strongly supported by the Tidelands cases, the Submerged Lands Act, and the *Alabama v. Texas* decision—is confirmed by this Court's treatment of the navigational servitude for Fifth Amendment purposes. While the Fifth Amendment precludes takings without just compensation, this Court has found that the United States need not compensate property owners when exercise of the navigational servitude results in loss of riparian access,[6] loss of use of submerged lands,[7] or loss of structures obstructing navigation.[8] Trelease, *Federal State Relations in Water Law* (National Water Commission Legal Study No. 5) 178 (1971). Even in the context of otherwise compensable takings, this Court

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[5] The *Alabama* Court declared that the lands under navigable waters may be treated "precisely as an ordinary individual may deal with his farming property. [The United States] may sell or withhold them from sale." 347 U.S. at 273 (quoting *Camfield v. United States*, 167 U.S. 518, 524 (1897)).

[6] *See, e.g., United States v. Commodore Park*, 324 U.S. 386 (1945); *Gibson v. United States*, 166 U.S. 269 (1897).

[7] *See, e.g., United States v. Chicago, Minneapolis, St. Paul & Pac. R.R*, 312 U.S. 592 (1941); *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 229 U.S. 82 (1913).

[8] *See, e.g., Louisville Bridge Co. v. United States*, 242 U.S. 409 (1917); *Union Bridge Co. v. United States*, 204 U.S. 364 (1907).

has refused to grant compensation for losses of property value attributable to, or dependent upon, presence of the servitude. *United States v. Rands*, 389 U.S. 121 (1967); *United States v. Twin City Power Co.*, 350 U.S. 222 (1956); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913); *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910). These holdings, in turn, have led to the rule that the servitude is a defect in the title to navigable waters, *see* Trelease, *supra* p. 8, at 175, as well as to the rule that Congress must enact special legislation extinguishing the servitude by declaring the appurtenant waters non-navigable. *E.g.*, 33 U.S.C. §§ 59(j),(q) (1982). *See* S. Rep. No. 1302, 92d Cong., 2d Sess. 2 (1972); 126 Cong. Rec. H28,381 (Sept. 30, 1980). *See also Bills to Promote the Exploration, Development, and Conservation of Certain Resources in the Submerged Lands and To Provide for the Use, Control, and Disposition of the Lands Beneath Inland Waters and In the Continental Shelf: Hearings on H.R. 2948 and Similar Bills Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 83d Cong., 1st Sess. at 229 (statement of John Lyle).

The rationale for this rule is plain: since the United States holds title to the navigational servitude, it need not pay compensation for using an interest which it already owns. Indeed, as the academic commentators have consistently pointed out, prior decisions issued by this Court make sense only if the United States owns the navigational servitude. Bartke, *The Navigation Servitude and Just Compensation—Struggle for a Doctrine*, 48 Or. L. Rev. 1, 2 (1968) ("the interest should be recognized for what it is and be dealt with in the context of the property clause of the Consti-

tution"); Munro, *The Navigation Servitude and the Severance Doctrine*, 6 Land & Water L. Rev. 491, 503 (1971) (the navigational servitude is "in effect ownership of the entire stream-flow"); Trelease, *supra* p. 8, at 176-81 (idea of servitude as property "offers an approach to the explanation of some cases").

As demonstrated by these commentators and by prior decisions of this Court, the navigational servitude is a property interest of the United States. Reserved to the United States by the Submerged Lands Act, the navigational servitude is an interest to which the United States holds title. Under the plain language of the Conservation Act and this Court's decision in *Gambell*, issuing a breakwater permit allowing Shee Atika to use the servitude triggered the protections for subsistence uses found in Section 810 of the Conservation Act. The court of appeals violated this principle when it allowed the Army Corps of Engineers to issue the breakwater permit without requiring compliance with Section 810 of the Conservation Act.

CONCLUSION

For the foregoing reasons, the Court should grant the writ, vacate the decision of the court of appeals, and remand for further proceedings consistent with this Court's decision in *Gambell*.

Respectfully submitted,

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